ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CA 06-951

FEBRUARY 28, 2007

FAHTIMA SOHALA AYDANI WAGNER
APPELLANT

APPEAL FROM THE COLUMBIA COUNTY CIRCUIT COURT
[NO. E-01-172-5]

V.

HONORABLE LARRY CHANDLER, JUDGE

GEORGE JONATHAN WAGNER
APPELLEE

AFFIRMED

Appellant Fahtima Sohala Aydani Wagner appeals the May 2, 2006 order of the Colombia County Circuit Court that granted custody of her daughter Bryce to her ex-husband, appellee George Jonathan Wagner. Appellant contends that the circuit court erred because there was no material change in circumstances from the first custody order, and further that it was clearly erroneous to conclude that Bryce's best interest was to be placed in appellee's custody. Appellant also purports to appeal the May 19, 2006, order that set appellant's child support duty at $38 per week. We affirm.

The following is a recitation of the facts leading to this appeal. The parties divorced in July 2001, when Bryce was a year and a half old. Both parents lived in Magnolia,

Arkansas. They agreed to joint custody, which the trial court approved. In practice, each parent had Bryce on alternating weeks. They divided extraordinary expenses incurred on Bryce's behalf, and therefore, there was no child support ordered at that time. Within a couple of years, the relationship between appellant and appellee soured as concerned the joint custody arrangement. Appellant moved to modify the decree in January 2004, asserting a material change in circumstances, specifically accusing appellee of unwillingness to work with appellant on shared custody exchanges. Appellant sought sole custody and child support. Appellee responded, denying the allegations, but also asserting a material change in circumstances warranting a change of custody to him and an award of child support from appellant. The parties were ordered to mediation by the trial court in July 2004, which was unsuccessful in resolving the ultimate dispute. The parties were able to resolve some issues regarding exchanging the child, her extracurricular activities, and church attendance. Nonetheless, appellee reiterated his request for a change of custody to him on the basis that he was in a stable marriage, expecting a new child with his wife, living in a suitable home, and earning a sufficient income to support his family. Appellee asserted that appellant had essentially a revolving door of paramours, no job, and no concerns about exposing their daughter to the men in her life. The cause came to be heard in April 2006.

Appellant appeared pro se, contending that she was unhappy about appellee's apparent attempt to replace her as Bryce's mother with his new wife. Appellant said she chose not to work, despite having a college education, because it freed her to be available at all times for

her daughter, and she was not suffering financially because her parents allowed her to live in a house they owned. She occasionally worked for her parents or her boyfriend, earning necessary monies to pay for Bryce's extra expenses that she divided with appellee. She admitted that she had been in several relationships since she was divorced from appellant, including one brief failed marriage, and she admitted that she had stayed overnight with her current fiancé while her daughter was present, but she denied any wrongdoing or that it harmed her child in any way. She also admitted that she often spent weekends in Shreveport, Louisiana, with her fiancé where he lived, and that she occasionally took Bryce with her. She said, however, that generally she and Bryce slept in a different bedroom from her fiancé. Appellant acknowledged that Bryce had missed a few days of school when appellant had the child, but she said that Bryce was ill on those days.

Appellee testified about his steady income and four-year marriage to his current wife. Appellee stated that he ensured that Bryce attended church and was never tardy or unduly absent from school. He believed that appellant was less concerned, having been informed that Bryce was late for school on several Mondays when she had had Bryce over the weekend. Appellee expressed concern that appellant was content to live off her parents or to whomever she was engaged for support. Appellee admitted, however, that his present wife was not planning to return to her job as a nurse following the birth of their child. Appellee maintained that he could provide the stability that Bryce needed, which was his most pressing concern.

After taking the matter under advisement, the trial court issued an order stating that both parties had recognized that the joint custody arrangement was unworkable and both sought full custody. The order was signed on May 1 and filed on May 2, 2006. The judge stated that he was not awarding custody based upon superior morals of one parent over the other. Rather, the trial court expressed its experience that joint custody generally did not work over time and that children do better with a sole custodian. The order stated:

> Based on a significant change in circumstances and after a careful consideration of what is in the best interest of the child, the court awards the care, custody, and control of Bryce to her father[.]

Because there was no reliable income information before him, the trial judge ordered appellant to provide such information upon which to enter an order on child support at a later time. The child support order was entered on May 19, 2006. On May 31, 2006, appellant filed a notice of appeal "from the Order issued by this Court on May 1, 2006 in the above styled matter."

The standard of review in child-custody appeals is well settled. Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the child; all other considerations are secondary. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). We review the evidence de novo, but we will not reverse the findings of fact unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses

in child-custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). *See also Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). With regard to errors of law, however, no deference is given to the trial court's decision. *See Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003).

Appellant first contends that the trial court clearly erred in declaring that there was a material change in circumstances since the divorce and joint custody order. This argument is not well taken. A joint-custody arrangement requires cooperation by both parents. *Gray v. Gray*, __ Ark. App. __, __ S.W.3d __ (Sept. 13, 2006). An award of joint custody where cooperation is lacking is reversible error. *Id.* We hasten to add that where both parties in a joint-custody arrangement seek to have custody awarded to themselves, and both acknowledge a material change in circumstances, there is no error in finding a change of circumstances. Here, it is undisputed that the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the child, failing to work out their differences in forced mediation, and this constitutes a material change in circumstances affecting the child's best interest. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). Indeed, appellant was the first party to assert that there had been a material change in circumstances in her motion to change the joint custody order, filed in January 2004.

Appellee also asserted that a material change in circumstances had occurred. The trial judge was essentially forced to make a best-interest determination for Bryce because the joint custody award was no longer workable.

Appellant's next contention is that the trial court clearly erred in finding that Bryce's best interest was served in her father's custody instead of hers. We disagree. Child custody awards are not made to punish or gratify the desires of either parent. *See Alphin v. Alphin*, 90 Ark. App. 71, 204 S.W.3d 103 (2005) affirmed in *Alphin v. Alphin*, __ Ark. __, __ S.W.3d ___(Dec. 8, 2005). We are not left with a distinct and firm impression that a mistake was committed in this instance. Therefore, we affirm the trial court's finding that Bryce's best interest was served in her father's custody.

To explain further, it is apparent that both parents love the child, are willing and able to spend quality time with her, and are willing to spend their resources on her behalf. Nonetheless, the trial judge had to make a determination, and we cannot say that this decision is clearly erroneous. There was evidence that the father had a more stable family environment, the father would have a new half-sibling with whom Bryce would enjoy a relationship, and the father had shown a greater degree of commitment to Bryce's religious upbringing. There was evidence that the mother had intermittent relationships with men whom she labeled fiancé, and she had cohabitated with her latest fiancé in the presence of the child. While we are not suggesting that there was overwhelming evidence to support that Bryce was better served with her father, there was evidence to support that finding and it was

not clearly erroneous. Giving the trial court the deference to which it is entitled in such cases, we cannot say the trial court clearly erred in finding an award of custody to appellee to be in the child's best interest. *See Alphin v. Alphin*, *supra*; *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

Appellant also argues that the trial court erred in awarding appellee $38 per week in child support in an order filed on May 19, 2006. We do not address this portion of appellant's argument because she did not appeal from this order. Her notice of appeal recites only the change-of-custody order signed on May 1. Rule 3(e) of the Arkansas Rules of Appellate Procedure - Civil provides that a notice of appeal "shall designate the judgment, decree, order or part thereof appealed from . . . [.]" Orders not mentioned in a notice of appeal are not properly before the appellate court. Ark. R. App. P.-Civil 3(e); *see also Conlee v. Conlee*, 366 Ark. 398, __ S.W.3d __ (2006); *Ark. Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988).

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.